FARLIM PROPERTIES SDN BHD

v.

GOH KEAT POH & ORS (AND OTHER APPEALS)

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NOS: P-02-146-2001, P-02-1032-2001 & P-02-144-2001]
19 SEPTEMBER 2003

CIVIL PROCEDURE: *Res judicata - Application of doctrine - Whether judgments in earlier proceedings determined point in issue with precision - Whether earlier judgments determined validity of contract for sale of defendants' land to plaintiff - Whether defendants were a party to earlier proceedings - Whether earlier proceedings concerned interlocutory matters or resulted in final judgment on rights of parties - Whether application would lead to unjust result - Whether judge wrong in relying on res judicata to strike out plaintiff's action for specific performance and injunction - Equitable and discretionary nature of res judicata*

CONTRACT: *Sale and purchase of land - Spes successionis - Whether subject matter of contract was defendants' spes successionis in land - Whether the fact that defendants had no title could defeat plaintiff's action for specific performance - Whether defendants could be compelled to perform contract under s. 17 Specific Relief Act 1950 once they acquired title - Whether judge wrong in relying on res judicata to strike out plaintiff's action for specific performance and injunction*

LAND LAW: *Sale of land - Spes successionis - Whether subject matter of contract was defendants' spes successionis in land - Whether the fact that defendants had no title could defeat plaintiff's action for specific performance - Whether defendants could be compelled to perform contract under s. 17 Specific Relief Act 1950 once they acquired title - Whether judge wrong in relying on res judicata to strike out plaintiff's action for specific performance and injunction*

Of the three appeals herein by the plaintiff before the Court of Appeal, the main appeal was from the decision of the learned judge allowing the defendants' application to strike out the plaintiff's action ('the said action') under O. 18 r. 19 of the Rules of the High Court 1980. The plaintiff/purchaser had brought the said action against the defendants for specific performance and other injunctive relief pending the disposal of its main suit against the defendants/vendors for certain declaratory and injunctive remedies. The primary issue that fell for determination before the justices of appeal was whether the learned judge was right in striking out the said action on the grounds of *res judicata* and issue estoppel, abuse of process of court, and want of cause of action or serious question to be tried.

Held (allowing the appeal):
Per Mohd Noor Ahmad JCA

[1] When the plea of *res judicata* is raised, it is necessary to identify with precision the issue that was decided in the earlier proceedings. In other words, the earlier judgment must, necessarily and with precision, determine the point in issue. For the purposes of the instant appeals, it was clear from the judgment of the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393 that the Federal Court did **not** consider and determine the validity of the agreements for the sale of the defendants' land to the plaintiff ('the 1992 agreements'). The Federal Court had merely held that as the administration of the deceased's estate was still incomplete at that particular point in time, the defendants, as beneficiaries, had no title to pass to the plaintiff. In any case, the defendants were **not** even a party to the said proceedings before the Federal Court. Furthermore, the decision of the Court of Appeal in *Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd & Satu Rayuan Lain* [1999] 3 CLJ 507 concerned an interlocutory order relating to injunctions. The proceedings before the Court of Appeal did **not** result in a final judgment or decree adjudging the ultimate rights of the parties. Consequently, the plea of *res judicata* (estoppel per rem judicatum) was inapplicable, and the learned judge was wrong in relying upon it to strike out the said action. (pp 516 e-h & 517 a)

[2] The subject matter of the 1992 agreements between the plaintiff and the defendants was the *spes successionis* the defendants had in the land they benefited from the deceased. The fact that the defendants, as at the date of the 1992 agreements, had neither title nor power to call for title was **not** of itself an answer to the plaintiff's action for specific performance. Upon the full administration of the deceased's estate in 1995, the defendants had acquired title and they could well be compelled to perform the contract under s. 17 of the Specific Relief Act 1950. Hence, the learned judge ought **not** to have applied the doctrine of res judicata as it would lead to an unjust result. The doctrine of *res judicata* has its roots in equity and, thus, retains the discretionary nature that is common to all equitable doctrines. (pp 517 g, 518 a-h & 519 a-b)

[Appeals allowed; plaintiff's action remitted to High Court for trial.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Di antara tiga rayuan di hadapan Mahkamah Rayuan di sini, rayuan utama adalah terhadap keputusan yang arif hakim membenarkan permohonan defendan mengetepikan tuntutan plaintif ('tindakan tersebut') di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif/pembeli telah membawa tindakan tersebut terhadap defendan untuk pelaksanaan spesifik dan relif-relif tegahan lain sementara menunggu tuntutan utamanya terhadap defendan/penjual bagi mendapatkan beberapa relif tegahan dan perisytiharan diputuskan. Isu utama yang memerlukan pertimbangan hakim-hakim rayuan ialah sama ada yang arif hakim betul apabila mengetepikan tindakan tersebut atas alasan *res judicata*/isu estopel, penyalahgunaan proses mahkamah dan ketiadaan kausa tindakan atau persoalan penting yang perlu dibicarakan.

Diputuskan (membenarkan rayuan):
Oleh Mohd Noor Ahmad HMR

[1] Apabila hujah *res judicata* dibangkitkan, adalah perlu untuk mengenal pasti dengan tepatnya isu yang telah diputuskan di dalam prosiding-prosiding terdahulu. Dengan kata lain, keputusan terdahulu mestilah secara nyata dan tepat memutuskan halperkara yang berbangkit. Bagi maksud rayuan-rayuan semasa, ianya jelas, dari penghakiman Mahkamah Persekutuan dalam *Chor Phaik Har lwn. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393, bahawa Mahkamah Persekutuan tidak mempertimbang dan memutuskan kesahan perjanjian bagi penjualan tanah defendan kepada plaintif ('perjanjian 1992'). Mahkamah

Persekutuan sebaliknya hanyalah memutuskan bahawa oleh kerana pentadbiran pusaka si mati masih belum selesai pada waktu material, defendan, selaku benefisiari, tidak mempunyai hakmilik untuk diserahkan kepada plaintif. Walau apapun, defendan bukanlah merupakan satu pihak kepada prosiding di hadapan Mahkamah Persekutuan tersebut. Selain itu, keputusan Mahkamah Rayuan dalam *Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd & Satu Rayuan Lain* [1999] 3 CLJ 507 menyentuh perintah interlokutori berkaitan dengan injunksi. Prosiding di hadapan Mahkamah Rayuan tidak mengakibatkan satu penghakiman muktamad atau dekri yang memutuskan hak-hak hakiki pihak-pihak. Dengan demikian, hujah res judicata (estoppel per rem judicatum) adalah tidak terpakai, dan yang arif hakim silap apabila bergantung kepadanya untuk mengetepikan tindakan tersebut

[2] Halperkara perjanjian 1992 di antara plaintif dan defendan adalah merupakan spes successionis yang diperolehi defendan dari tanah yang mereka terima dari si mati. Fakta bahawa defendan, pada waktu perjanjian 1992, tidak mempunyai hakmilik mahupun kuasa untuk menuntut hakmilik bukanlah, atas hal itu semata-mata, suatu jawapan kepada tuntutan plaintif untuk pelaksanaan spesifik. Selepas pentadbiran sepenuhnya pusaka si mati dalam tahun 1995, defendan telah memperoleh hakmilik dan mereka sememangnya boleh diarah untuk melaksanakan kontrak di bawah s. 17 Akta Relif Tertentu 1950. Dengan demikian, yang arif hakim tidak sepatutnya menggunapakai doktrin res judicata kerana ia akan menjurus kepada keputusan yang tidak adil. Doktrin res judicata berakar umbi pada ekuiti dan, dengan itu, mengekalkan sifat kebudibicaraannya sepertimana halnya dengan semua doktrin-doktrin ekuiti.

Rayuan dibenar; tuntutan plaintif dikembalikan ke Mahkamah Tinggi untuk perbicaraan.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1996] 1 SCR 29 ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***

Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd [1999] 3 CLJ 507 CA ***(refd)***

Kersah La'usin v. Sikin Menan [1966] 2 MLJ 20 ***(refd)***

Kok Hoong v. Leong Cheong Kweng Mines Ltd [1964] MLJ 49 ***(refd)***
Nik Mohamed Salleh v. Tengku Besar Zabidah [1971] 1 MLJ 73 ***(refd)***
Tong Lee Hwa & Anor v. Lee Yoke San [1979] 1 MLJ 24 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 44(1)
Contracts (Malay States) Ordinance 1950, s. 44(1)
National Land Code, s. 327
Rules of the High Court 1980, O. 18 r. 19
Specific Relief Act 1950, s. 17(a)
Specific Relief (Malay States) Ordinance 1950, s. 17(a)

For the plaintiff/appellant - Mahinder Singh (Shahida Harun); M/s Mahinder Singh Dulku & Co
For the defendants/respondents - Kirubakaran (Joseph Yeo & Ramanathan); M/s Ram Pillai & Assoc

[Appeal from High Court, Pulau Pinang, Civil Suit No: 22-307-96; Originating Summons No: 24-1084-2001 & Civil Suit No: 22-307-96]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Noor Ahmad JCA:
Three appeals were before us. The first appeal, Civil Appeal No. P-02-146-2001, is the appeal by the plaintiff against the decision of the learned judge who allowed the defendant's appeal against the decision of the learned senior assistant registrar who dismissed the defendant's applications for striking out under O. 18 r. 19 of the Rules of the High Court 1980. In the second appeal, Civil Appeal No. P-02-1032-2001, the plaintiff appealed against the decision of another learned judge who dismissed he plaintiff's application for the extension of a Private Caveat No. 2669/98 Jilid 541 Folio 184 lodged by it against 41 lots listed therein (except lot 500, Mukim 16, North East District, Penang and lot 1561, Section 3, Town of Air Itam, Penang) until the final disposal of the third appeal. The third appeal, Civil Appeal No. P-02-144-2001 is an appeal by the plaintiff against the decision of the learned judge who dismissed the plaintiff's action in consequence of the decision appealed against in Civil Appeal No. P-02-146-2001. We heard the first appeal first. We allowed the appeal. As the result, we also allowed the third appeal. We ordered one set of costs here and in the High Court

for the two appeals. We remitted the action to the High Court for full trial. We did not proceed with the second appeal as a fresh caveat had been entered by the plaintiff.

To summarize the undisputed facts.

(1) In 1949, the lands in dispute were held under Grant First Grade Nos. 4661 and 5650 for Lot. Nos. 1457 and 1835, Mukim 13, North East District, Penang (the said Lands). The registered proprietor was Choong Lye Hock Estate Sdn. Bhd (the CLHE), which held 25% for itself and 75% of the said lands for the estate of Chor Bah Say (the deceased). The majority of the deceased's beneficiaries died resulting in the 1st to 6th defendants becoming the beneficiaries of the deceased's estate. Thus, the surviving beneficiaries (Chor Phaik Har and Chor Phaik Sim (the surviving beneficiaries)) were entitled to three quarters (3/4) undivided share in the said lands.

(2) In 1991, the plaintiff intended to buy the said lands from all the beneficiaries of the deceased's estate. However, the surviving beneficiaries refused to sell. They lodged a caveat against the whole of the said lands. Subsequently, on 23 January 1992 two sale and purchase agreements (the 1992 agreements) were executed between the CLHE and all the beneficiaries of the deceased's estate, except the surviving beneficiaries, on one part as vendors and the plaintiff as purchaser for a total consideration of RM32,006,000. At this point of time the administration of the deceased's estate had not been completed. Armed with the 1992 agreements, the plaintiff applied for the removal of the caveat lodged by the surviving beneficiaries. It was allowed. On appeal, the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393 allowed the appeal.

(3) On 19 May 1995, the CLHE obtained from the High Court an Order for distribution of the deceased's estate to the respective beneficiaries. The distribution was made accordingly and the administration of the deceased's estate was completed. However, prior to the Order, on 11 January 1995, the CLHE and the beneficiaries to the 1992 agreements terminated the 1992 agreements allegedly on the ground of the plaintiff's failure to furnish the bank guarantees as stipulated therein. Then, on 21 March 1995, the 1st to 6th defendants entered into a sale and purchase agreement with the 7th defendant (the GISB) to sell their respective undivided share of the deceased's estate. On 17 April 1996, the GISB entered a caveat on the said

lands. The purchase price had been paid to the defendants (except the 5th defendant) and the memorandum of transfer had been registered (except in respect of the 5th defendant's share).

(4) On 8 May 1995, the plaintiff, by an originating summons, sought, *inter alia*, for a declaration that the 1992 agreements were still valid and subsisting and for a further order that the GISB and the defendants be injuncted and restrained from transferring, assigning, charging, leasing or entering into or effecting any dealings in respect of the defendants' undivided share in the deceased's estate. And on 27 September 1996, the plaintiff filed the present action seeking, amongst others, for an injunction to restrain the defendants and the GISB from executing, transferring, assigning, charging and dealing with the said lands pending the disposal of the originating summons, an order that the transfer of the said lands to GISB be set aside and for specific performance of the 1992 agreements. The plaintiff contended that the defendants were in breach of the 1992 agreements and that the 1992 agreements had not been terminated but were still subsisting and capable of performance. On 3 October 1996, the plaintiff obtained the *ex parte* injunction sought for and subsequently filed an application for *inter partes* hearing. The GISB and the defendants (except the 3rd defendant) applied to set aside the *ex parte* injunction. On 11 December 1996, the High Court granted the injunction sought by the plaintiff and dismissed the GISB's and the defendants' applications to set aside the *ex parte* injunction. On appeal, the injunction was dissolved by the Court of Appeal (see *Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd* [1999] 3 CLJ 507).

We scrutinized the judgment of the learned judge. She stated that the principal issue for determination in the appeal before her is whether the Federal Court decision and the Court of Appeal decision in the aforesaid cases had decided with precision the point in issue in the action, that is to say, the validity of the 1992 agreements? After having dealt with the highlights of the two judgments she opined:

> After carefully scrutinizing the fundamental and collateral issues in the judgment of the Federal Court and the judgment of the Court of Appeal referred to by Counsels in their respective submissions I am of the following opinion. As for the judgment of the Federal Court, in deciding the issue whether Farlim was a person aggrieved within the meaning of section 327 of the NLC and whether they could apply for the removal of a caveat. I am of the view that in deciding the issues before it, it did go into the issue of the validity of the 1992 Agreements. The capacity of the beneficiaries to enter into the Sale and Purchase Agreements was taken as an important issue by the Federal Court. The Federal Court then made

an unequivocal finding that the beneficiary defendants did not have the legal capacity to sell all the rights, title and interest in the said lands to Farlim as the Estate of Chor Bah Say remained unadministered and distributed. The 1992 Agreements were held to be unenforceable and void because the beneficiaries could not have consented to sell what they did not have. In my considered judgment the pronouncement by the Federal Court constitutes a binding precedent constituting issue estoppel precluding Farlim from questioning the validity of the 1992 Agreements and binding on all parties upon whom they were pronounced. Admittedly the 1st to 6th Defendants were not parties to the Federal Court case. However the subject matter of the Federal Court case and the instant case are the same and the Plaintiff is therefore bound by the findings of the Federal Court.

Likewise in respect of the Court of Appeal judgment in dissolving the injunction. I am of the considered opinion that the Court of Appeal in dissolving the injunction must necessarily be construed to have considered the question of whether the issues raised, ie, whether 1992 Agreements were valid and whether the 1992 Agreements had been validly terminated constitutes serious question to be tried. The respective Sale and Purchase Agreements between the beneficiary defendants and GISB were clearly discussed in the Court of Appeal judgment. By dissolving the injunction the Court of Appeal clearly found that there were no issues to be tried.

The Court is bound by both the Federal Court and the Court of Appeal judgments. Having carefully studied and perused the issues and judgments concerned, I am of the considered opinion that, although the prayers sought for in those cases were different, the subject matter under scrutiny in the appeals before the Federal Court and the Court of Appeal, were clearly the validity of the 1992 Agreements.

She concluded that to allow the action to proceed is an abuse of the process of court and the plaintiff is precluded from re-agitating the same matter which had been finally adjudicated by the Federal Court and the Court of Appeal as their pronouncements on the issue of the validity of the 1992 Agreements is final and conclusive. And finally, she allowed the appeals by reason that the statement of claim discloses no cause of action against the defendants and dismissed the action with costs.

4. (1) Before us, the learned counsel for the plaintiff contended that:

(a) the Federal Court in the aforesaid case did not make any pronouncement on the validity of the 1992 Agreements. What was decided in the case is merely that because at the date of the execution of the 1992 Agreements the administration of the deceased's estate had not been completed the beneficiaries had no interest or property in the estate so

as to give them any title to the lands to pass to the plaintiff. In the result, the plaintiff could not rely on the 1992 Agreements to justify its status as 'a person aggrieved' under s. 327 of the National Land Code for the removal of the caveat. In short, the Federal Court did not determine with precision on the validity of the 1992 Agreements. The Court of Appeal in the aforesaid case also did not determine as such. It was an interlocutory proceeding before the Court of Appeal. Hence, the decision of the Court of Appeal cannot be *res judicata*;

(b) The Federal Court case was decided in 1992. Since then there had been changed circumstances. Firstly, on the conduct of the defendants. Previously, the beneficiaries did not quarrel about the validity of the 1992 Agreements. Only in 1995, at the time when the aforesaid Court of Appeal case was decided, they changed their stance and conspired by the 7th defendant they wrongfully terminated the 1992 Agreements. Yet, they retained the deposit including the additional sums paid by the plaintiff under the 1992 Agreements and used the money to pay the arrears of quit rent on the said lands for the relevant years. The 7th defendant was not a *bona fide* purchaser. Hence, *res judicata* does not apply. The learned judge should have considered the causes of action in the statement of claim in the light of contract law. Secondly, the administration of the deceased's estate was completed by then. As such, although the beneficiaries had no title to the estate they could enter into the relevant 1992 Agreements, which is not void but only unenforceable. Once they had acquired the title after the administration of the estate was completed they can be compelled to perform the contract under s. 17 of the Specific Relief Act 1950 (the SRA); and

(c) on the facts of the case, *res judicata* should not be applied because it will result in injustice to the plaintiff.

The learned counsel cited the relevant authorities to fortify his argument, which will be reflected in our findings.

(2) On the contrary, the learned counsel for the defendants asserted that:

(a) the learned judge applied *res judicata* in the wider sense, that is to say, issue estoppel. By necessary reasoning, the Federal Court in the aforesaid case would have decided on the validity of the 1992 Agreements though no specific finding was made on the issue. For the court to decide whether the plaintiff was an aggrieved party it invited the court to decide on the validity of the 1992 Agreements. The issue on s. 17 of the SRA was before the High Court Judge and the Federal Court in the aforesaid case. Hence, the matter cannot be relitigated;

(b) the relevant 1992 Agreements was in respect of the purchase of the beneficiaries' shares in the estate, but not the right of inheritance and spes successionis. Hence, s. 17 of the SRA is not relevant; and

(c) the learned judge had exercised her discretion correctly in making the decision. Therefore, the decision should not be disturbed.

5. (1) A lucid exposition on the doctrine of *res judicata*, that is to say, doctrine of estoppel per rem judicatum can be found in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1996] 1 SCR 29. In that case, the finance company granted certain fixed loan to the borrower to finance a housing project. As a security for the loan, the borrower charged several pieces of land to the finance company. The borrower defaulted in his payments and the finance company obtained an order for sale of the charged lands from the Land Administrator. As a consequence of the borrower being unable to utilise the balance of the loan, the borrower had difficulty in completing the housing project. Then, the borrower filed an originating motion in the High Court (the first action) against the finance company to set aside the order for sale and for damages suffered by the borrower in consequence of the failure of the housing project. The borrower alleged that the finance company was in breach of the loan agreement in withdrawing the loan facilities because the dates of the drawdown of the loan were extended or had been waived by the finance company. The High Court dismissed the borrower's application. On appeal, the Supreme Court dismissed the appeal. The borrower then brought another action (the second action) against the finance company in the High Court, claiming for damages on the same grounds as that in the first action. The finance company applied to strike out the borrower's statement of claim on a plea of *res judicata*. The High Court dismissed the application of the finance company. The finance company appealed to the Federal Court.

(2) Peh Swee Chin FCJ, having distilled from a host of authorities on the doctrine of *res judicata* stated:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*. It is only just that no one ought

to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadam cause.* Both maxims are the rationales for the doctrine of *res judicata,* but the earlier maxim has the further elevated status of a question of public policy.

Since a *res judicata* creates an estoppel per rem judicatum, the doctrine of *res judicata* is really the doctrine of estoppel per rent judicatum, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say that *res judicata* is a rule of procedure and that an estoppel per rem judicatum is that of evidence. Such dichotomy is apt to give rise to confusion.

... there are in fact two kinds of estoppel per rem judicatum. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court of a particular remedy are determined in a final judgment and such right of action ie the cause of action, merges into the said final judgment; in laymen's language, the cause of action has turned into the said final judgment. The said cause of action may not be re-litigated between the same parties because it is *res judicata.*

In order to prevent multiplicity of actions and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.

On the other hand, issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties.

This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision.

a It is important to bear in mind the manner in which issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and NOT to issues which might have been and which were not brought forward, either b deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata* ie doctrine of estoppel per rem judicatum.

c We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind d the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

e The plea of *res judicata* succeeded and the appeal was allowed.

6.(1) When the plea of *res judicata* is raised it is necessary to identify with precision the issue that was decided in the earlier proceedings. In *Tong Lee Hwa & Anor v. Lee Yoke San* [1979] 1 MLJ 24; [1981] 1 MLJ 54 Chang f Min Tat FC held that to constitute a *res judicata*, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 'necessarily and with precision' determine the point in issue. The decision was affirmed by the Privy Council in [1981] 1 MLJ 54. To us, it is indeed clear from the judgment in *Chor Phaik Har v. Farlim Properties Sdn Bhd*, supra that the Federal Court did not at all g consider on the validity of the 1992 Agreements. The issue was only raised by the learned counsel for the appellant in the case in his submission before the court. However, the court merely held that as the administration of the deceased's estate was not completed at that point of time the beneficiaries had no title to pass to the plaintiff and as such, the plaintiff was not 'a h person or body aggrieved' for the purpose of removal of the private caveat. Whatever it is, *res judicata* can never be applied in favour of the defendants because *res judicata* only prohibits a cause of action from being re-litigated between the same parties but in that case the defendants were never a party.

i

And in *Gerak Indera Sdn Bhd lwn. Farlim Properties Sdn Bhd, supra* although the defendants were a party, *res judicata*, whether in the narrow sense or the wider sense, cannot apply because the matter involved in the case is in respect of an interlocutory order relating to injunctions. It is trite law that for *res judicata* to apply the proceedings must have resulted in a final judgment or decree, that is to say, the one which adjudges the ultimate rights of the parties or finally puts the case out of court.

(2) The circumstances had changed since the decision of the Federal Court in the aforesaid case. The administration of the deceased's estate was completed sometime in 1995 after distribution Order was obtained from the High Court by CLHE on 19 May 1995. That was the position when the appeal came before the learned judge. In *Nik Mohamed Salleh v. Tengku Besar Zabidah* [1971] 1 MLJ 73, the Federal Court held that although the beneficiaries of the deceased's estate had no title to the land which they agreed to sell under an agreement they had a spes successionis in the land. As such, the administrator of the deceased's estate was compelled to transfer the whole land to the purchaser, by virtue of the provisions of s. 17(a) of the Specific Relief (Malay States) Ordinance 1950 (the SR (MS) Ordinance) and s. 44(1) of the Contracts (Malay States) Ordinance 1950 [the C(MS) Ordinance). Section 17(a) of the SRA, which is in *pari materia* with the same section of the SR(MS) Ordinance, states:

> Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:
>
> (a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of that interest;

And s. 44(1) of the Contracts Act 1950, which is similar to the same section of the C(MS) Ordinance, provides:

> (1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise.

In *Kersah La'Usin v. Sikin Menan* [1966] 2 MLJ 20 where, under an agreement, the sole beneficiary sold the land registered under his deceased mother's name, in his judgment Raja Azlan Shah J (as His Highness was then) stated:

> The first consideration is whether the plaintiff could enter into a contract with the defendant's (deceased) father involving a subject matter which was then not subsisting in the sense that the said land was still in his mother's name. It is not disputed that he was the sole beneficiary and that he was in such a position that when the time came he could perfect the title of the purchaser. The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself an answer to a suit of specific performance by the purchaser; *Brickies v. Snell* [1916] 2 AC 599. Actual possession of both the legal estate and any equitable rights are not pre-requisites so long as the vendor is in such a position that when the time for completion comes he will be in a position to pass on the title to the purchaser. In those circumstances the contract is good but only in equity.

What is discernible from the authorities is that a beneficiary to a deceased's estate can enter into a contract of sale of land involving a subject mater which is not subsisting in the sense that the land is still in the deceased's name. However, when the beneficiary comes to be in a position to pass on the title to the purchaser he can be compelled by the purchaser to make good the contract out of that interest. Although in the present appeal, cl. 1.1. of the relevant 1992 Agreements states that the sale is in respect all the rights, title and interest and shares of all the beneficiaries in the said lands, to our mind, having regard to the fact that the administration of the deceased's estate had not been completed at the time of its execution, the subject matter involved in the transaction is none other than the sale of spec successionis. As specific performance of the 1992 Agreements as prayed for by the plaintiff in the action is an equitable relief the court will look at the substance rather than the form. Anyway, it is still open to the plaintiff to amend its pleading to cover this point, if it so wishes, before the trial of the action.

(3) The plaintiff alleged that, besides the deposit of RM1.2 million, it had paid additional sums to the defendants (re para. 39(ix) of the amended statement of claim @ 51 Rekod Rayuan Jilid 1). However, the defendants merely made a general denial of the allegation (re para. 35 of the amended statement of defence @ 109 Rekod Rayuan Jilid 1). And it is evident that the arrears of quit rent on lot 1561 and the quit rent on the other lots for 1993 were settled out of the deposit paid by the plaintiff under the 1992 Agreements (re para. 16 @ 489 Rekod Rayuan Jilid II). Further, the deposit and the additional sums paid by the plaintiff are being kept by the defendants. And further, the defendants changed their stance only after having obtained title to the said lands. On those facts, the learned judge

ought not to have applied the doctrine of *res judicata* because to do so would lead to an unjust result. We are in complete agreement with the statement of this court in *Chee Pok Choy & 4 Ors v. Scotch Leasing Sdn Bhd (Penerima dan Pengurus yang dilantik)* [2001] 2 CLJ 321, to the effect that the doctrine of *res judicata* has its roots in equity and hence, retains its discretionary nature that is common to all equitable doctrines. Further, since the purpose of the doctrine of *res judicata* is to achieve justice, a court may decline to apply it where do so would lead to an unjust result. And further, whether *res judicata* in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the case lies.

Therefore, on the aforesaid reasons, we are satisfied that the learned judge had erred in interfering with the exercise of the discretion by the learned senior assistant registrar in the striking out applications.